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# Prepared Observations on "The Courts and Lawmaking"

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PREPARED OBSERVATIONS ON  
"THE COURTS AND LAWMAKING"

PRESENTED AT THE  
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## Comment

BY ROGER J. TRAYNOR

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We have come a long way from the time when courts were on guard to keep statutes in their place, in the shadow of the stone tablets of precedent. For a good many years now legislatures have been erecting some formidable stone tablets of their own, inscribed in language richly current if not always clear and crisp. Justice Breitel recognizes not merely that the legislatures are now dominant in the formulation of laws, but that they must be, in a world undergoing change too rapidly to await the slow elaboration of new hand-tooled precedents or the painful deciphering of modern meanings from the fading language of the old. In most of their affairs when regulation seems necessary, men now look to the next legislative session, not to the day of judgment. In street wisdom, it is easier to legislate than to litigate. This commonplace connotes a flexibility of legislative action frequently synonymous with sensitivity to community needs though sometimes no more than a capitulation to special interests. A legislature can run up a law on short notice, and when it has finished all the seams it can run up another and another. It is engaged in mass production; it produces piecework of its own volition or on order. The great tapestry of Holmes's princess, the seamless web of the law, becomes ever more legendary.

Whatever our admiration for ancient arts, few of us would turn the clock back to live out what museums preserve. The law of contracts was once well served by delightful causeries of learned

judges that clarified the meaning of obligation. Such causeries, however, proved inadequate to provide an expansion and diversification of words to correspond with that of business enterprise. Thus it fell to the legislators to spell out whole statutes such as insurance codes and the uniform laws dealing with negotiable instruments, sales, bills of lading, warehouse receipts, stock transfers, conditional sales, trust receipts, written obligations, fiduciaries, partnerships, and limited partnership. Such statutes can take a birds-eye view of the total problem, instead of that of an owl on a segment. They can encompass wide generalizations from experience that a judge is precluded from making in his decision on a particular case. Legislatures can break sharply with the past, if need be, as judges ordinarily cannot. They avoid the wasteful cost in time and money of piecemeal litigation that all too frequently culminates in a crazy quilt of rules defying intelligent restatement or coherent application. Most of all they can take the initiative in timely solution of urgent problems, in contrast with the inertia incumbent upon judges until random litigation brings a problem in incomplete form to them, often too soon or too late for over-all solution. What passes before them on the reviewing stand is not a well-programmed orderly parade, but fragments from a circus on the loose, collared by anxious barkers for a motley procession across the line of vision that defies the viewing judges to guess at all that has escaped notice and to foresee what may still appear. Understandably, they are wont to shirk the difficulties of working out program notes for the future from such a scene. Their professional training, moreover, fosters reactions to present impressions that hark back to the past; they search for resemblance between what goes on and what has gone before. And because the usual judge is no less lethargic than other human beings, he is predisposed to accept a specious analogy and to freeze it into the law. It is not thereafter easily defrosted, as some of us well know who have had to deal with icebergs that have developed beyond reasonable proportions.



There is now general agreement that we have moved out of the Ice Age. It is no longer enough for lawyers to have a respectable training in precedents and a respectful preoccupation with the past. There are no adequate precedents for much of the law that must be formulated today to regulate multiminded, multi-handed human beings. The main preoccupation of such law must be with the future. Its main formulation belongs appropriately to legislators, who are freer than judges to write on a clean slate, in terms of policy transcending case or controversy, and to erase and rewrite in response to community needs.

Some fear that the proliferation of statutes and administrative regulations will subject the judge to an impossible burden of review. Others fear instead that it will lead to his rapid technological depreciation. A judge unaccustomed to public sympathy must nonetheless be disconcerted if he receives it for the wrong reasons. He knows these two concerns on his behalf to be mistaken as well as contradictory. As he plods his way from one controversy to another, he is inured to overemployment. He fears no unemployment, for he knows that *plus ça change, plus c'est la même chose* in action. Television has not superseded radio, nor radio the phonograph, nor any of them the live musicians. Instead all have flourished and the miracles of technical reproduction have but quickened our awareness of how inimitable is the live performance. The endless statutes and regulations should in time, by the very impersonality of their numbers that yet reflects the involvement of their drafters, engender a new appreciation of the irreplaceable humanity in the individual judicial opinion that yet reflects the detachment of its author.

When Warner Gardner finds it impossible to make a still-life definition of the administrative process he knows so well, he nonetheless sharpens our perception of the *fait accompli* of this now massive fourth power of government by illustrating the variety and suppleness of its operations and then emphasizing that on

the whole the administrators are discreetly aware of the omnipresence of judicial review, however limited its scope. When Justice Breitel finds it impossible to make a categorical definition of the statutory process, he nevertheless succeeds in clarifying it by emphasizing the startling range in its methods and in the quality of its products which, whether works of art or inventions of the devil, reflect on the whole indifference to judicial review, however wide its scope.

Likewise one may find it impossible to speak categorically of the judicial process as felt influence or unseen power or simply as wilderness crying in a judicial voice. Here too, however, one can summon illustrations of its infinite variety that yet reflect the general awareness of the judges that however others hasten forth they must make their own haste slowly. Their task will become the more important as it increasingly involves not only decision on actual cases but decision on the selection of cases for review. Certainly no rude priority is accorded to common law cases over those arising out of statutes. Moreover, the distinction between so-called "private law" and so-called "public law" becomes increasingly blurred in a crowded society that is continually diminishing the boundaries of private lives as it expands the boundaries of public interest.

It is true, as Justice Breitel has noted, that whole subjects of the law are still largely unclaimed by legislatures. Although they are free to make such appropriation, that possibility cannot justify judicial abdication of present responsibility for their development. A generation ago Mr. Justice Cardozo reflected from experience that the judicial process had recurringly to be creative. For recurringly it happened that a judge failed to find the amiable *ratio decidendi* supposedly awaiting discovery among the reeds of precedent to swaddle a foundling case becomingly and set its cries at rest. Since he could not let it cry forever, he must needs swaddle it with some inventive covering suitable for the occasion



and durable enough to serve the future. Every basic precedent was thus once made up out of whole cloth woven by a judge.

There is now wide agreement that a judge can and should participate creatively in the development of the common law. Yet each time he does so, he must reckon with the ancient suspicion that creativeness is a disturbing excess of skill, at odds with circumspection, darkly menacing the stability of the law. Actually, the creative decision is circumspect in the extreme, for it reflects the most careful consideration of all the arguments for a conventional solution and all the circumstances that now render such a solution so unrealistic as to doom its serviceability for future cases. Although the judge's predilections may play a part in setting the initial direction he takes toward the creative solution, there is little danger of their determining the solution itself, however much it bears the stamp of his individual workmanship. Our great creative judges have been men of outstanding skill, adept at discounting their own predilections and careful to discount them with conscientious severity. The disinterestedness of the creative decision is further assured by the judge's arduous articulation of the reasons that compel the formulation of an original solution and by the full disclosure in his opinion of all aspects of the problem and of the data pertinent to its solution. Thereafter the opinion must pass muster with scholars and practitioners on the alert to note any misunderstanding of the problem, any error in reasoning, any irrelevance in data, any oversight of relevant data, any premature cartography beyond the problem at hand. Every opinion is thus subject to approval.

The real concern is not the remote possibility of too many creative opinions but their continuing scarcity. The growth of the law, far from being unduly accelerated by judicial boldness, is unduly hampered by a judicial lethargy that masks itself as judicial dignity with the tacit approval of an equally lethargic bar. The legal training that should quicken imaginative use of the

rich grammar of the law in opinions and also in briefs induces a disquieting number of sanctimonious copies of old forms of speech that bear little relation to present-day life. We have a plethora of copycats. Whatever progress we are making, as in rules of civil procedure, is woefully inadequate to meet the need for a modernized law. Massive anachronisms endure in its substance, their venerability discouraging judges from voicing the rude possibility that they may have reached retirement age.

What of the vaunted stability in this enshrinement of precedents? In practice, distinctions of all manner are appended to the shrine. No one knows what fiction is to be taken straight; no one can be sure what constitutes the present object of veneration. Law offices, wise in the ways of our unstable idol worship, meditate well their emphases and understatements in the presentation of a case and sometimes present it with substantial omissions. A judge learns from experience to be wary of giving full faith and credit to any presentation, however plausible, however polished. He must educate himself as best he can to the possibilities that may be lurking in the wings. Even with the advantage of detachment, however, he cannot hope to ferret them all out, for they are legion. He too must select, on another plane from that of the advocates, the issues that appear to him salient and the data that appear significant. In a morass of uncertainty lie a variety of precedents, and the judge makes selection upon selection before reaching his decision. It is no ready text to come by and there is no well-edited chapter to which it can be added. The precedents are writ in type that moves like water and they are not holy writ.

For the most part the precedents serve well enough to guide men in their legal affairs. When they invite litigation, however, their stability is already in question, perhaps because they have been rendered ambiguous by conflicting interpretations, or have grown archaic, or have been challenged at last as they should have

been earlier for their original nonsense. Why then should we not welcome their frank renunciation when it is reasonably clear that there has been no reliance on them<sup>44</sup> or that they have cast enough shadows behind them to render any further reliance on them unjustifiable? Those who plead reliance do not necessarily practice it. Thus counsel for a client that had sold liability insurance to a state agency pleaded the sovereign immunity doctrine; on questioning, however, he conceded that the agency had insured itself in awareness of the growing limitations on the doctrine as set forth in a case decided in 1898.<sup>45</sup>

The plea of reliance would perpetuate archaic precedents. We have not begun to make use as we should of the sensible solution approved nearly a generation ago in *Great Northern Ry. v. Sunburst Oil & Refining Co.*<sup>46</sup> The court simultaneously protected those who might have relied on such a precedent and gave warning that it would no longer control future cases. One who has invoked this solution to no avail may be permitted to lament that it has met with such resistance.<sup>47</sup>

The alternative is to live uneasily with an unfortunate precedent by wearing it thin with distinctions that at last compel a cavalier pronouncement, heedless of the court's failure to make a frank overruling, that it must be deemed to have revealed itself as overruled by its manifest erosion. It must be cold comfort to bewildered counsel to ruminate that the precedent on which he relied was never expressly overruled because it so patently needed to be.

<sup>44</sup>See CARDOZO, *THE GROWTH OF THE LAW* 122 (1924); SCHAEFER, *PRECEDENT AND POLICY* 12-13 (1955).

<sup>45</sup>*Guidi v. State*, 41 Cal. 2d 623, 262 P.2d 3 (1953).

<sup>46</sup>287 U.S. 358 (1932).

<sup>47</sup>*Sutter Basin Corp. v. Brown*, 40 Cal. 2d 235, 249, 253 P.2d 649, 656 (1953); *Boyd v. Oser*, 23 Cal. 2d 613, 623, 145 P.2d 312, 317 (1944); cf. *County of Los Angeles v. Faus*, 48 Cal. 2d 672, 680-81, 312 P.2d 680, 685-86 (1957); *People v. Ryan*, 152 Cal. 364, 369, 92 Pac. 853, 855 (1907); *People v. Maughs*, 149 Cal. 253, 263, 86 Pac. 187, 191 (1906).



Still, if all is not at attention in the courts, neither is all at ease. They have significantly expanded the concept of obligation. They are recognizing a much-needed right to privacy. They are recognizing a right to recovery for prenatal injuries and intentionally inflicted mental suffering.<sup>48</sup> They are recognizing the right of one member of the family to recover against another.<sup>49</sup> They are recognizing liability once precluded by charitable or governmental immunities. The now general acceptance of the manufacturer's liability to third persons for negligence has stimulated inquiry into appropriate bases for possible strict liability for injuries resulting from defective products.<sup>50</sup> The courts are moving closer to open preoccupation with compensation for personal injuries, which is bound in turn to augment the scope of insurance.

Obviously, however, they cannot undertake the comprehensive studies, or act upon them, for rational solution of such overwhelming problems as arise from the daily destruction on the highways. They cannot even begin to cope with the resulting litigation. There is grave question that adversary presentation and jury findings reconstruct the circumstances of an injury accurately enough to assess liability justly and to award appropriate damages.<sup>51</sup> There is such extraordinary inconsistency in the determinations as to cast doubt upon the rationality of expressing liability in terms of fault. A Columbia University study has demonstrated that liability turns on many things besides fault, notably on ability to pay, usually tantamount to insurance, and on insurance company practices as to settlement.<sup>52</sup> In all likeli-

<sup>48</sup>*State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952).

<sup>49</sup>*Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955).

<sup>50</sup>*Gordon v. Aztec Brewing Co.*, 33 Cal. 2d 514, 523, 203 P.2d 522, 528 (1949) (concurring opinion); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion).

<sup>51</sup>See Traynor, *Fact Skepticism and the Judicial Process*, 106 U. PA. L. REV. 635, 640 (1958).

<sup>52</sup>COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS 92 (1932).

hood the reforms that such studies suggest will sooner or later materialize in legislation, where they most appropriately belong. The courts will then no longer spend most of their time on the highways; they will be freer to consider the large problems that have preceded and succeeded the comparatively recent advent of the automobile.

Prophecy is more difficult in areas such as the criminal law, whose development has rested with the courts since time immemorial. Had the world always known what we know now, had the learned judges of other days enjoyed the advantage of later learning, had more of them been courageous and imaginative as well as merely learned, had customary beliefs not always constituted a phalanx against new ideas, we might have had a rational development of criminal law. Instead, its development has been warped by successive irrationalities that have matched the potions and bloodletting of medicine. The persistent inadequacy of our senseless hodgepodge of precedents is the more shocking in comparison with such undertakings as the Model Penal Code of the American Law Institute now evolving under the leadership of Professor Wechsler of the Columbia Law School. One hesitates to plead for reforms in the name of common sense, however, for we belong to a profession that prides itself on not throwing chaos lightly to the winds.

Nowhere do its excesses of caution persist more tenaciously than in the law of evidence. Warily it resists the seductive reason of such proposals as the Model Code of Evidence and the Uniform Rules. It is still possible to say, as Professors Morgan and Maguire said some twenty years ago, that "there is scarcely a segment of the subject which does not call for re-examination and revision."<sup>53</sup> We can ill afford such passive resistance. Were we to keep accounts as business must, we would soon realize how

<sup>53</sup>Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 922 (1937).

seriously our obsolescent methods impede our productivity and impair the quality of our products. The legislatures are quite properly uninterested in undertaking reforms that are so plainly a responsibility for bench and bar. Unfortunately bench and bar have shirked that responsibility with assiduous care.

Justice Breitel has noted that the legislature also properly keeps its distance in those areas of the law whose problems are so complicated and whose development is therefore so unpredictable as to defy formulation of rules in advance. When, as in conflict of laws, new cases not only fail to portend future directions but also fail to respond to the facile theories of the past, the need is all the greater for judicial imagination in decision bold enough to reject already unrealistic rules, yet cautious enough not to make formulations that reach too zealously into the future. More, it must also be skillful enough to strengthen emphasis not only on the freedom of the forum in choice of law but also on its corresponding responsibility for the local law it thus makes. Such responsibility calls for perception in distinguishing between real and spurious conflicts at the outset. It precludes a provincial point of view, for the responsible decision proceeds from reflection as to which jurisdiction has the dominant interests and a consideration of these interests against others in the light of local policy.

Though the main responsibility for rational development of conflict of laws rests with the courts, it is for the legislatures to modernize existing statutes, in such fields as the administration of decedents' estates, where provincial preoccupation with local interests makes administration needlessly slow and cumbersome and costly. Increasingly they must envisage uniform laws where states are at odds not on basic policy but on such mechanics of regulation as notice to creditors and creditors' priorities.<sup>54</sup>

The relatively undeveloped field of conflict of laws serves to dramatize not only what large creative jobs the courts must under-

<sup>54</sup>See *People v. One* 1953 Ford Victoria, 48 Cal. 2d 595, 311 P.2d 480 (1957).



take but also what comprehensive statutory revision falls to legislatures. Such creativeness and such revision is needed in every field of the law to keep pace with the epochal changes in our once self-contained little world. The task of the judges will continue to be the lonely one of detached adjustment of controversies. These are becoming so complex that we should be concerned less to multiply judges than to minimize sources of controversy. We tend to think that legislators can minimize controversy if they are so minded by producing model laws. Justice Breitel rightly reminds us that they are now so heavily engaged in investigation and law-making on so many fronts that we cannot expect them to close ranks for the single-minded task of making repairs and renewals in the common law. What they can do is to follow the example of such states as New York and California and set up law revision commissions, secure enough to withstand the prevailing winds of pressure groups, that would make timely use of the abundant wasting assets of scholarly studies in a continuous formulation of statutes that would command respect for their careful drafting without claiming a sanctity for their printed words that would discourage periodic reexamination of their fitness for survival.

There are those who would entice us with the proposition that we can solve our problems by reducing the number of our laws. Theirs is a siren song to lure us from the arduous labor that the times call upon us to perform. We cannot revert to a primitive simplicity in our laws when our mode of living becomes ever more complex. However much a law revision commission can expedite the liquidation of obsolete or superfluous statutes, it must be prepared to formulate new and better ones.

The day is fast coming when no state can afford to be without such a commission. The complexities hastening that day are bound to hasten also the wholehearted recognition, advocated by Mr. Justice Stone in 1936, of statutes as sources of law, "starting points for judicial lawmaking comparable to judicial deci-

cisions."<sup>55</sup> Sporadic recognition there has been and it is growing, as Justice Schaefer of the Illinois Supreme Court recently noted, citing such illustrations as judicial development of the law based upon the Married Women's Acts but transcending their literal terms.<sup>56</sup> Nevertheless courts have not begun to utilize all the latent energy in statutes to generate new law. Clues to the possibilities appear in the analogies the courts have already made from statutes. They have long been invoking in negligence cases the standards of conduct set forth in penal statutes as a test for civil liability. There is of course great variety of invocation. Thus in a single case the judges stated their separate views that the statutory standard for criminal liability was the appropriate one for civil liability, that violation of the penal statute created a rebuttable presumption of negligence, and finally that such violation was merely evidence of negligence.<sup>57</sup>

However bumbling, such invocation of statutes exemplifies their kinship with precedents and tolls the weakness of the lingering pedantry that sees them only as alien successors or usurpers. Statutes, like precedents, may be radioactive, their emanations expanding with the times. Such may be the penal statutes specifying liability with reference to a particular area or class. Suppose, for example, a penal statute regulates conduct only on the public highways, in a jurisdiction where all crimes are statutory. The court could not properly extend the area of crime by applying the statute to conduct on private roads. If the statute sets forth an appropriate standard of reasonable conduct for all roads, however, the court should be free to invoke it in a civil case involving negligence on a private road even though there has been no criminal violation.<sup>58</sup>

<sup>55</sup>Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12 (1936).

<sup>56</sup>Schaefer, PRECEDENT AND POLICY 18-19 (1955).

<sup>57</sup>Satterlee v. Orange Glen School Dist., 29 Cal. 2d 581, 177 P.2d 279 (1947).

<sup>58</sup>Cf. Clinkscales v. Carver, 22 Cal. 2d 72, 136 P.2d 777 (1943).

The court should also be free to make broad use of the standards in penal statutes preoccupied with the protection of a particular class. It is literal in the extreme to regard that preoccupation as indicative of indifference to the protection of any others. Yet the rule persists that a plaintiff cannot base a cause of action for negligence on the violation of a penal statute unless he is a member of the class the statute was designed to protect. Thus one who is not an employee is precluded from invoking a statute designed solely to protect employees even though he is injured by the very conduct proscribed. It is logic run riot that a statute requiring the barricading of an open well or elevator shaft for the protection of employees cannot, by virtue of its particularity, be invoked for the protection of any others.

We have been slow not only in drawing pertinent analogies from statutes but also in expanding the connotations of their own terms to keep pace with the incessant inventiveness of our economy. We forget that legislatures are neither omnipresent nor omniscient. Whatever their alertness to the times, the currency of their statutes begins to depreciate the moment they are enacted. Even if they were in perpetual session they could not possibly enact all the postscripts to yesterday's regulations that the events of each day would suggest. And if some machine could conceivably be devised to tabulate such postscripts they would be self-defeating, for their very numbers would defy intelligent application. To say as we did earlier that we are bound to have more laws is not to advocate that they should roll off a ticker tape.

If in many fields it is impossible to prophesy forthcoming events and idle to tabulate actual ones, we must expect our statutory laws to become increasingly pliable to creative judicial elaboration. Nevertheless, in Justice Breitel's apt words, "the legislative tradition in this country assumes and depends on a dynamic and modernized common law system of law." In some fields more than in others the courts have been responsive to this tradition.



One might note by way of illustration how the California courts have interpreted an 1872 statute authorizing service of process on foreign corporations doing business in the state. Since 1872 there has been great diminution in the protection from suit afforded foreign corporations by the due process clause. The mutations in that clause have had their effect on the state court's interpretation of the phrase "doing business in the state." They have reasoned that at the time of its adoption it afforded not so much a test for immunity as a test for jurisdiction, consonant with the tenor then of the due process clause. The elastic contours of that clause make it unlikely that any test for jurisdiction geared to its then current tenor was more than illustrative of service of process in accord with the jurisdictional concepts of that period. As those concepts have expanded, the courts have found that the literal wording of the 1872 test correspondingly expanded in meaning.<sup>59</sup> One could find other illustrations of the leeway afforded to courts by a changing Constitution for the interpretation of statutes closely tied thereto.

Many a statute, however, stands outside the radiations of the flexible Constitution and is contained in terms that have no radiations of their own into the common law. The task of the courts is then not creative utilization of the statute as a source or supplement of the common law but merely a rendition of its meaning that conforms to the legislative purpose. Yet even here, as Justice Breitel reminds us, there are large problems of interpretation. Certainly the court is not at liberty to seek hidden meanings not suggested by the statute or the available extrinsic aids. Speculation cuts brush with the question: what purpose did the legislature express as it strung its words into a statute?

An insistence upon judicial regard for the words of a statute does not imply that they are like words in a dictionary to be read with no ranging of the mind. They are no longer at rest in their alphabetical bins. Released, combined in phrases that imperfectly communicate the thoughts of one

<sup>59</sup>Henry R. Jahn & Son v. Superior Court, 49 Cal. 2d 855, 323 P.2d 437 (1958).

man to another, they challenge men to give them more than passive reading, to consider well their context, to ponder what may be their consequences.<sup>60</sup>

Judges have found more than once that absolute phrases are subject to qualifications implicit in the context of the whole statute. Judge Edgerton has invoked the classic illustration of the Bologna ordinance against bloodletting in the streets, which did not make criminals of surgeons.<sup>61</sup> The United States Supreme Court has interpreted a statute, forbidding encouragement to aliens to migrate to this country to perform services of any kind, as not applicable to the employment of a clergyman by a church.<sup>62</sup> Our own court in California has made a comparable interpretation of a phrase specifically requiring dismissal of an action not brought to trial within five years.<sup>63</sup> Certain express exceptions in the statute afforded a basis for implied exceptions in the seemingly absolute phrase, when the statute was read as a whole in the light of its legislative purpose "to prevent *avoidable* delay for too long a period."<sup>64</sup> Hence, the statute did not compel dismissal when it was impossible, impracticable, or futile to bring the action to trial.

There are times when words thus tested prove themselves so at odds with a clear legislative purpose as to pose a dilemma for the judge. He knows that there is an irreducible minimum of error in statutes because they deal with multifarious and frequently complicated problems. He hesitates to undertake correction of even the most obvious legislative oversight, knowing that theoretically the legislature has within its power the correction of its own lapses. Yet he also knows how cumbersome the legislative process is, how massive the machinery that must be set

<sup>60</sup>*People v. Knowles*, 35 Cal. 2d 175, 182, 217 P.2d 1, 5 (1950).

<sup>61</sup>*Ross v. Hartman*, 139 F.2d 14, 16 (1943).

<sup>62</sup>*Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). Compare *Caminetti v. United States*, 242 U.S. 470 (1917) (reliance on literal words) with *Mortensen v. United States*, 322 U.S. 369 (1944) (reaction against such reliance).

<sup>63</sup>CAL. CODE CIV. PROC. § 583.

<sup>64</sup>*Rose v. Knapp*, 38 Cal. 2d 114, 117, 237 P.2d 981, 983 (1951).

in motion for even the smallest correction, how problematic that it will be set in motion at all, how confusion then may be worse confounded.

What a court does is determined in the main by the nature of the statute. It may be so general in scope as to invite judicial elaboration. It may evince such careful draftsmanship in the main as to render its errors egregious enough to be judicially recognized as such, inconsistent with the legislative purpose. Thus a revenue act that set forth the basis for determining uncompensated loss from damage to nonbusiness property failed to specify that depreciation should enter into the computation. The taxpayer claimed that since he was not allowed depreciation under another section he need not compute it in determining his loss. He therefore claimed a deduction of \$1,635 based on original cost although his actual loss was only \$35. In rejecting his claim the court found that the missing specification was implied by the apparent legislative purpose in the statute read as a whole and declared that the reason of the law in such cases should prevail over its letter.<sup>65</sup>

The experienced draftsmen of tax laws find it impossible to foresee all the problems that will test the endurance of their words. They did not foresee the intriguing question whether the United States is a resident of the United States, which arose under a revenue act taxing interest received by foreign corporations from such residents. What to do when a foreign corporation received interest from the United States? Mr. Justice Sutherland decided that this country resided in itself. He found a spirit willing to take up residence though the flesh was weak, if indeed not entirely missing. The ingenuity of the solution compels admiration, whatever misgivings it may engender as to our self-containment.<sup>66</sup>

<sup>65</sup>*Helvering v. Owens*, 305 U.S. 468 (1939); see Traynor, *Tax Decisions of The Supreme Court*, 1939 PROCEEDINGS OF THE NATIONAL ASSOCIATION 27, 55-57.

<sup>66</sup>*Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 92 (1934).



So the courts now and again prevent erratic omissions or wayward words from defeating legislative purpose, even though they thereby disregard such conventional canons as the one that tax statutes are to be strictly construed against the government. We may well ask why they should not disregard such a canon altogether when it so handily serves the tricks and devices of taxpayers who would avoid their tax liabilities at the expense of their fellows.<sup>67</sup> The image persists of a Gargantuan government pitted against a little taxpayer carrying a burden too big for his frail bones. Actually, of course, there are millions of taxpayers sharing the burden of payment for the services they have come to expect of their government. Whenever one of them is successful at tax avoidance the burden on all the others, most of whom are quite little, becomes so much the greater. If we accept the legislative purpose of distributing the tax burden justly, that purpose should prevail over a pedantic strict construction against the government that in effect militates against other taxpayers.

We might well look askance at all canons of interpretation that deflect attention from the legislative purpose. The more courts intone these ancient saws, the less realistic is their concern apt to be with the meaning of the statute they are asked to interpret. They should be particularly on guard against repetitive invocations in areas such as criminal law, already obscured with archaic classifications of offenses. In California the Penal Code specifically places the courts on guard with the injunction that "its provisions are to be construed according to the fair import of their terms with a view to effect its objects and promote justice."<sup>68</sup> The courts are thus encouraged to abandon clichés in determining the legislative purpose.

This freedom has enabled them to reflect critically on the recur-

<sup>67</sup>See *Latilla v. Inland Revenue*, [1943] 1 All E.R. 265; *Howard de Walden v. Inland Revenue Commissioners*, [1942] 1 K.B. 389, 397 (C.A. 1941); discussed in Friedmann, *Statute Law and Its Interpretation in The Modern State*, 26 CAN. B. REV. 1277, 1282, 1298 (1948).

<sup>68</sup>CAL. PENAL CODE § 4.

ring problem of when *mens rea* is an essential element of a crime whose statutory definition does not specify it although general provisions in the Penal Code<sup>69</sup> appear to require it without exception. Our court has resolved this problem in the case of bigamy<sup>70</sup> and the felonious possession of narcotics<sup>71</sup> by making wrongful intent an essential element of the crime. We have resolved the problem in manslaughter<sup>72</sup> by making criminal negligence an element. Again, to insure its constitutionality, we have read into a statute compelling the forfeiture of any automobile used to transport narcotics a requirement that the possessor of the automobile have knowledge of what he is transporting.<sup>73</sup> In contrast, we have interpreted as primarily regulatory rather than penal, and therefore as requiring no interpolation of *mens rea*, the so-called "public welfare offenses" carrying light penalties and involving no moral obloquy. Thus a druggist who innocently sold an adulterated drug that caused a death was guilty of violating a statute prohibiting such sales; but since his offense lacked the essential *mens rea* it was not an "unlawful act" within the definition of involuntary manslaughter.<sup>74</sup>

The court's broad use of its authorization to interpret the fair import of statutory language in the interest of justice had necessarily to be creative in interpreting incompletely coordinated provisions with due consideration for the public interest in both crime prevention and protection of the innocent. It is important to add that any court undertaking such interpretation should articulate with particular care the reasons that led to its choice of alternatives.

We come upon an intriguing but quite different problem when we consider what should be the fair import of legislative silence in the wake of statutory interpretation embodied in the occasional

<sup>69</sup>CAL. PENAL CODE §§ 20, 26.

<sup>70</sup>People v. Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956).

<sup>71</sup>People v. Winston, 46 Cal. 2d 151, 293 P.2d 40 (1956).

<sup>72</sup>People v. Stuart, 47 Cal. 2d 167, 302 P.2d 5 (1956).

<sup>73</sup>People v. One 1941 Buick Sport Coupe, 28 Cal. 2d 692, 171 P.2d 719 (1946).

<sup>74</sup>People v. Stuart, 47 Cal. 2d 167, 302 P.2d 5 (1956).

precedent that proves increasingly unsound in the solution of subsequent cases. Barring those exceptional situations where the entrenched precedent has engendered so much reliance that its liquidation would do more harm than good, a court should be free to overrule such a precedent despite legislative inaction.

It is unrealistic to suppose that it [the legislature] can note, much less deliberate the effect of each judicial construction of statutory provisions, absorbed as it is with forging legislation for an endless number and variety of problems, under the constant pressure of considerations of urgency and expediency. The fiction that the failure of the Legislature to repudiate an erroneous construction amounts to an incorporation of that construction into the statute not only commits the Legislature to embrace something that it may not even be aware of, but bars the court from reexamining its own errors, consequences as unnecessary as they are serious.<sup>75</sup>

Nonetheless we can rest assured that any backwardness of the courts is sooner or later noted by the commentators. Judicial lethargy sometimes enables unworthy decisions to endure longer than they should, but at least they are in the public stocks and subject to the critical glance of any passer-by. The commentators might well begin to emulate such examples as that of the Columbia Law School, whose leadership is noted by Professor Newman, and train their critical eyes on statutes as they long have on judicial opinions.

Still we can hardly expect that there will ever be widespread heed to the subdued alarms of scholars. So we come to it that it is for the bar to participate in far larger measure than ever before in the rational development of the law by giving consistent and organized help in the transformation of scholarly projects into laws. It is not too much to expect of the education that fits lawyers for private practice that it should also make them generously responsive to the need for rational laws in the public interest.

<sup>75</sup>*In re Halcomb*, 21 Cal. 2d 126, 132, 130 P.2d 384, 388 (1942) (dissenting opinion); see also *Rosemary Properties, Inc. v. McColgan*, 29 Cal. 2d 677, 706-08, 177 P.2d 757, 775-76 (1947) (dissenting opinion).